

No. 20-71522
No. 20-71705

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALTURA COMMUNICATION SOLUTIONS, LLC,

Petitioner

and

NATIONAL LABOR RELATIONS BOARD,

Respondent

and

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 21,**

Intervenor.

Request for Review and Cross-Application for Enforcement of a Decision of the
National Labor Relations Board (NLRB Case No. 13-CA-174604)

PETITIONER'S REPLY BRIEF

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I. THE COUNSEL FOR THE GENERAL COUNSEL FAILS TO SHOW THE BOARD PROPERLY APPLIED THE WELL-ESTABLISHED ATLANTA HILTON “TOTALITY OF CONDUCT” TEST.

A. The Agency Is Not Entitled to Take An Ostrich-Like View of the Evidence.

Throughout its brief, the Counsel for the General Counsel (“CGC”) urges the Court to grant almost *carte blanche* deference to the factual findings of the Agency and the weight it purported to give the record evidence. This argument fails to respect the duty of the Agency to fairly consider the “substantial evidence in the record as a whole.” 29 U.S.C. § 160(e); *Ass’n of Theatrical Stage Employees, Local 15 v. NLRB*, 957 F.3d 1006, 1013 (9th Cir. 2020) (“IATSE, Local 15”). “The substantial evidence test compels [the Court] to evaluate the entire record.” *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008).

Simply put, the Agency cannot disregard conflicting evidence that supports Altura’s position. As the U.S. Supreme Court explained in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Administrative Procedure Act requires fair consideration of all of the evidence, including evidence that detracts from an agency’s findings:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts

from its weight. This is clearly the significance of the requirement in both [the Administrative Procedure Act and the Taft-Hartley Act] that courts consider the whole record. ...

... [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

340 U.S. 474, 487–88 (1951). The Agency cannot take an ostrich-like view of the evidence and ignore the overwhelming facts showing that Altura had a sincere desire to reach an agreement, albeit one that it viewed acceptable to it.

B. The CGC, Like the Agency, Disregards the “Totality of Conduct” Test.

A review of the brief of the CGC shows a blatant disregard of the well-established “totality of conduct” test required by its own precedent and the precedent of this Court. *Atlanta Hilton*, 271 NLRB 1600, 1603 (1984); *Seattle-First Bank v. NLRB*, 638 F.2d 1221, 1225-1226 (9th Cir. 1981); *IATSE, Local 15*, 957 F.3d 1006, 1016 (9th Cir. 2020). Indeed, the CGC barely mentions this governing test (or the governing precedent) as the starting place of any analysis of alleged bad faith bargaining (CGC Brief, p. 27). Further, rather than weighing all the evidence of all of Altura’s bargaining table conduct, the CGC quickly launches into a one-sided subjective assessment of the Company’s proposals and purported other “misconduct” in November 2015 while ignoring the full course of bargaining. This

is an abject failure to follow the requirements of both the Administrative Procedure Act and the *Atlanta Hilton* “totality of conduct” test.

This failure by the CGC replicates the failure of the Agency in this regard. Specifically, the Board’s Decision pays brief lip-service to consideration of the “totality of the circumstances” and “an employer’s total conduct” (Board Dec. at p. 3) (devoting one-half of one-paragraph to mention the standard). Yet, its analysis over the remainder of the Decision is devoted exclusively to a subjective evaluation of the Company’s proposals – with no mention of any of the evidence of Altura’s conduct that supports a finding of good faith bargaining and a sincere desire to reach an agreement. *Id.* at pp. 4-6. This is clearly a failure to “apply[] established law to the facts” and to consider the “record as a whole.” *IATSE, Local 15*, 957 F.3d at 1013.

C. The Board’s Decision Relies Overwhelmingly, If Not Exclusively, on an Impermissible Subjective Evaluation of the Company’s Proposals.

The CGC does not and cannot seriously argue that the Board’s Decision did not rely overwhelmingly on its subjective evaluation of the Company’s proposals. The entirety of the Agency’s analysis examines and assails eleven (11) of Altura’s proposals. In each instance, the Agency offers a subjective interpretation of each proposal to find that the proposals were made in bad faith with an intent to “frustrate the possibility of arriving at any agreement.” (Board Dec. at p. 3 (quoting *Public*

Service Co. of Okla., 334 NLRB 487, 487 (2001)). Yet the Agency reaches its conclusion based on almost pure speculation and subjective judgments as to the Company's motivation and intent, without considering:

- the analogous provisions in the existing collective bargaining agreement which the parties had obviously found agreeable and acceptable previously;
- the business rationales provided by Altura at the table for the changes from existing language, including the Company's declining business and recent near-bankruptcy, the technological changes in the industry and differing skill sets among the technicians, and the need to use contractors to meet customer needs;
- the fact that the parties reached agreement on most of the proposals identified by the Agency as "unacceptable;" and
- the remaining critical items in dispute involved wages, reclassification of lower-skilled technicians, and use of contractors (issues on which it is not unusual for labor and management to deadlock).

Additionally, in prosecuting the case, the CGC presented no evidence that any of the Company's proposals were remotely unusual or inconsistent with labor-management norms. And, most tellingly, the CGC does not argue and the Board did not find that any of the specific proposals made by the Company were illegal or even

permissive subjects of bargaining. To the contrary, the Agency made a point of specifically observing that various Company proposals (including broad management rights, no-strike, unit-placement, and zipper clauses) were not per se unlawful. (Board Dec. at p. 2, n.3).

In this context (*i.e.*, where every proposal is lawful and supported by some combination of prior agreements between the parties, a sound and articulated business rationale, and/or actual new agreements reached between the parties), the Court must ask on what basis can the Board have reasonably found that that the Company made such proposals with an intent to frustrate the possibility of reaching agreement? Rather obviously, the Board's assessment is not based on substantial evidence, but on impermissible subjective assessments of the proposals and speculation as to Altura's intent that is contradicted by the evidence. *See NLRB v. American Insurance Co.*, 343 U.S. 395, 404 (1952) (the Board may not "sit in judgment upon the substantive terms of collective bargaining agreements"); *Commercial Candy Vending Div.*, 294 NLRB 908, 908 (1989) (it is improper for the NLRB to engage in a "subjective evaluation of [a] Company's proposals"). The Court should hold that the Agency clearly overstepped in evaluating the Company's proposals.¹

¹ Moreover, in finding that the Company's proposals were impermissible, the NLRB is effectively attempting to compel the Company to offer and agree to other contract provisions – something which the U.S. Supreme Court has squarely said it

D. The CGC Fails to Show that Altura's Bargaining Table Conduct is Analogous to that in *Regency Service Carts* or *Public Service Co. of Okla.*

Unable to point to any specific proposal made by the Company that evinced an intent to frustrate the possibility of arriving at an agreement, the CGC attempts to argue that the Altura's proposals "in combination" showed such intention (CGC Brief at 29-39). In making such argument, however, the CGC (like the Board) grossly mischaracterizes the Company's proposals as seeking "unilateral control [over] virtually all significant terms of employment" (CGC Brief at 29; Board Dec. at 6). This is patently false, as the CGC and Board ignore that Altura's final offer contained:

- High guaranteed base wages
- Fixed standards for classification as Level A or Level AA
- Pension contributions to the union-sponsored pension plan
- Overtime premiums above legal requirements
- Guarantees of no reduction in paid time off (vacations, sick leave, etc.)
- Just cause discipline and discharge provisions
- Final and binding arbitration of contract and discipline/discharge disputes
- Procedures and standards for layoffs and generous severance benefits

may not do. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (the NLRB "is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement").

Additionally, bargaining unit employees also received significant protection (and potential reward) by linking some benefits, like health and disability insurance, to non-bargaining unit employees in the form of parity or “me, too” provisions, and the possibility of receiving additional merit or market driven wage increases over the contractual minimums – the same way those particular benefits and merit increases had been handled by the parties for several years. The assertion that the proposed agreement gave the Company “unilateral control [over] virtually all significant terms of employment” is simply false.

Likewise, the CGC and Agency assert that the Company’s proposal sought to “strip the union of any effective method of representing its members” and “cede substantially all of its representational function” (CGC Brief at 30; Board Dec. at 6). Again, this is simply untrue. The Company’s final offer contained:

- Mandatory dues payment and dues checkoff for the union
- Time off, including paid time off, to conduct union representation functions
- A robust grievance procedure with final and binding arbitration of disputes

Nothing in the Company’s proposals unlawfully demanded that the Union waive any representational function during the term of the agreement other than the very typical waiver of the right to strike, slowdown or interfere with work (in exchange for both

a no lockout pledge and arbitration of disputes)² and the agreement to a zipper clause to waive mid-term bargaining (which is the product of having already bargained as to wages, hours, terms and conditions of employment for the term of the agreement).³

Peeling back the layers of the Board's and CGC's analytical onion, it is obvious that they have gone to great lengths to attempt to make this case analogous to *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005) and *Public Service Co. of Okla.* 334 NLRB 487 (2001). As discussed in Altura's Opening Brief at pp. 50-52, the facts of this case are in stark contrast to those presented in those prior Agency decisions. In those cases, the employers' proposals were far more onerous and provided fewer guarantees than those provided here – and, most importantly, the examination of the proposals was part of a much broader set of allegations and simply confirmed other “smoking gun” evidence showing a pattern of surface bargaining. In other words, the Board and CGC have merely recited decisional dicta

² It is well established that a union's waiver of the right to strike during the term of an agreement is the quid pro quo for the employer's agreement to submit grievances to arbitration. *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-248 (1970); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

³ Likewise, this Court has clearly held that an employer may lawfully propose and insist to impasse on a “zipper clause” which “close[s] out bargaining during the contract term.” *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 879 (9th Cir. 1978) (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 423 (1967)).

to try to shoehorn this case into an inappropriate factual paradigm. They have failed to compare the actual underlying facts of the cases or undertake a reasoned analysis as to whether the overall conduct in this case is in fact the same as in *Regency Service Carts* or *Public Service Co. of Okla.*

II. THE CGC’S ASSERTION THAT THE BOARD’S DECISION RELIED ON OTHER ALLEGED VIOLATIONS OF THE ACT LACKS SOUND BASIS IN THE DECISION.

A. Altura Unequivocally Petitioned for Review of the Board’s Decision Finding “Overall Bad Faith Bargaining,” And In No Manner Waived Its Right to Rebut the CGC’s Arguments Related to Purported “Other Indicia” Not Referenced By the Board in Its Decision.

In response to Altura’s petition for review, and in support of the Board’s own application for enforcement, the CGC asserts that “the Board’s decision makes clear [that] its finding of bad faith rests ... also on ‘additional indicia of bad faith.’” (CGC Brief, pp. 39-40). A cursory review of the Board’s Decision, however, makes this claim dubious at best.

Specifically, in supporting the finding of overall bad faith bargaining, the Board’s Decision discusses in substance only Altura’s proposals from which it draws the inference of bad faith bargaining (Board Dec. 1-6). The Board’s Decision does not substantively analyze, and clearly does not rely upon, any other alleged conduct to support a finding of “overall bad faith bargaining.” Indeed, as to purported “other indicia,” the Board specifically only notes that it (a) disagreed with the

Administrative Law Judge's ("ALJ") finding that the Company's unilateral implementation was "an indicum of bad faith," (b) disagreed with the ALJ's finding that "bargaining history weighed against a finding of a good faith impasse," and (c) disagreed with the ALJ's finding that the Company's no-strike proposal was evidence of bad faith (Board Dec. at p. 2, fns. 4 & 5).

Arguing for a more expansive reading of the Board's Decision than the Agency itself provided, the CGC attempts to bootstrap the underlying decision of the ALJ to the Board's Decision and to treat them as one in the same, despite specific rejection by the Board of various aspects of the ALJ's analysis. In this regard, although the Agency has the obligation to articulate the basis of its decision in its decision (and although Altura specifically filed exceptions to aspects of the ALJ's decision which the Board did not address), the CGC asserts that the Board also based its finding of "overall bad faith bargaining" on: (a) premature declarations of impasse by Altura, (b) refusing requests for in-person meetings at locations demanded by the Union, and (c) dismissing "out of hand" proposals made by the Union in November 2015 (CGC Brief, pp. 41-54).

As an initial matter, the CGC asserts that Altura has waived any argument as to these findings by the ALJ (but not mentioned specifically by the Board) by not specifically addressing them in its Opening Brief. This assertion fails on multiple levels. First, it ignores that Altura has clearly petitioned for review of the Board's

finding of overall bad faith bargaining, which necessarily includes any component elements thereto. Second, it ignores that the Board's Decision itself did not specifically articulate these components as part of its finding (even though Altura had filed exceptions to such findings below); rather, it is the CGC relying on the ALJ's decision that attempts to push these components as vital. Third, the CGC ignores that, in the situation of a petition for review and cross-application for enforcement of a decision of the NLRB, neither party is considered the "moving" party for purposes of briefing, but rather that Rule 15.1 of Federal Rules of Appellate Procedure merely sets a default briefing schedule to make any party adverse to a decision of the Board proceed first. The CGC having raised and argued purported "other indicia of bad faith" in its brief on behalf of the Board, Altura is fully entitled to argue and rebut such purported factors in its own briefing.⁴

⁴ The case cited by the CGC, *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999), is readily distinguishable from this case. First, *Smith v. Marsh* is not an agency review/enforcement action in which the agency must support its application for enforcement. Second, in *Smith v. Marsh*, the arguments being raised by the appellant on reply had not been raised either before the district court or in its initial brief – and thus were entirely new issues raised on reply. Third, this Court's analysis of waiver arguments in connection with NLRB review/enforcement actions has typically looked to whether the arguments or issues were raised in the agency proceedings below and whether the arguments or issues were within the scope of the review sought of the overall finding. See *International Broth. of Elec. Workers, Local 21 v. NLRB*, 563 F.3d 418, 423 n.1 (9th Cir. 2009); *NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 16*, 873 F.2d 236, 237 (9th Cir. 1989). In this case, it is clear that Altura raised these issues below to the Board and has petitioned for review of the Board's "overall bad faith bargaining" finding. Regardless, the CGC having raised these

B. In Asserting That Altura “Prematurely Declared Impasse,” the CGC Confuses the Assessment of Impasse With the Elements of Good Faith Bargaining and the *Atlanta Hilton* Factors.

Whether a party’s statement that it believes the parties are at impasse is evidence that can support a finding of overall bad faith bargaining is a different and distinct inquiry from whether or not an impasse was in fact reached. The CGC confuses and convolutes these inquiries (CGC Brief at pp. 41-49).

Specifically, in discussing Altura’s periodic statements that it believed that the parties were at impasse, the CGC fails to analyze such statements against the “totality of conduct” standard set forth in *Atlanta Hilton*. Instead, the CGC (like the ALJ) misdirects the inquiry to the factual question of whether or not an impasse in fact existed at the time Altura voiced its belief in that regard. But whether or not an impasse existed on each occasion is largely irrelevant. Indeed, whether or not an impasse exists is only relevant to determine whether the duty to bargain is temporarily suspended and whether an employer may unilaterally implement terms consistent with its final offer.

As has been repeatedly discussed, the Act does not require a party to make concessions beyond those it wishes to make. *IATSE, Local 15*, 957 F.3d at 1015 (citing and quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 486-488 (1960);

issues and arguments in support of its application for enforcement, Altura is not precluded from rebutting such arguments.

Seattle-First Nat. Bank, 638 F.2d at 1227, n.9). After extensive meetings in which it provided a reasoned basis for its proposals, made numerous counterproposals and concessions, and reached tentative agreements on some 90% of a new collective bargaining agreement, Altura was legally entitled to move no further – and to clearly state to the Union that it was unwilling to provide additional concessions in the negotiations. *Commercial Candy Vending Div.*, 294 NLRB 908, 908 (1989) (“A party is entitled to stand firm by a bargaining proposal legitimately offered.”). Altura was also entitled to inquire or test whether the Union had any additional proposals as to the significant issues of disagreement. If “neither party [appears] willing to yield,” then either party is certainly free to communicate that it believes the parties are deadlocked and at impasse. Such statements and inquiries alone have no legal effect themselves.

Rather, as the precedent clearly shows, a “premature declaration of impasse” is probative (though not dispositive) of possible overall bad faith bargaining only where (a) a party states that it believes there is an impasse or deadlock in negotiations and (b) the statement of impasse is accompanied by a cessation of bargaining or unilateral implementation of terms where no actual impasse exists. Thus, in the one case cited by the CGC for the principle that a premature declaration of impasse can support a finding of overall bad faith bargaining, *Grosvenor Resort*, 336 NLRB 613

(2001), the employer presented its final offer and refused to engage in further negotiations, as described by the Board:

In the June 24 meeting, the Union presented its counteroffer. However, the Respondent stated that it was not meeting to negotiate and the Union had its final offer. The Respondent refused to discuss the Union's counteroffer, stating that the parties were at impasse, and advised the Union of implementation of some provisions in its offer. The union representatives expressed their desire to negotiate. Although the parties had agreed to meet on June 25 (prior to the June 24 meeting), they did not do so.

336 NLRB at 614. The employer then unilaterally implemented terms of its final offer before resuming any negotiations. The Agency found that this situation (*i.e.*, where the employer declared impasse after the union had presented a counteroffer and refused to discuss such counteroffer) was a premature declaration of impasse which, in combination with other conduct (including the *per se* violation of insisting to impasse on a non-mandatory subject of bargaining) was evidence of overall bad faith bargaining. *Id.* at 615-616. Notably, in *Grosvenor Resort*, the record was also clear that both parties still had flexible bargaining postures. *Id.*

Here, while Altura conveyed at the end of the July (and then again after the September mediated sessions) that it had no further room to move and tested whether the Union had additional proposals, such statements were not accompanied by either a refusal to re-engage or by an immediate unilateral implementation of terms. Rather, the Company repeatedly indicated a willingness to re-engage if the Union had new proposals to advance that would break the deadlock, and did in fact resume

negotiations both with the mediator in September and via video-conference in December.

The Board faults Altura for asking the Union to provide an indication of where it might have new concessions in response to the Union's request to keep bargaining – but the law is very clear that such an inquiry was appropriate once the Company made its final offer. As summarized by the D.C. Circuit:

[A] vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions, is equally insufficient to defeat an impasse where the other party has clearly announced that its position is final. Indeed, as the court noted in addressing the breaking of an impasse, “[t]he Board itself has indicated that a party’s ‘bare assertions of flexibility on open issues and its generalized promises of new proposals [do not clearly establish] any change, much less a substantial change’ in that party’s negotiation position.” *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996) (quoting *Civic Motor Inns*, 300 NLRB 774, 776 (1990)).

TruServ Corp. v. NLRB, 254 F.3d 1105, 1117 (D.C. Cir. 2001) (emphasis added).

The Act does not require the parties to reach agreement, and does not require interminable, endless bargaining at times when the parties are deadlocked.⁵

⁵ Contrary to the argument of the CGC (CGC Brief, p. 45 fn. 11), the fact that Altura made additional concessions in the September 23-24 mediated bargaining sessions does not undercut Altura's belief (or the fact) that the parties were at a state of impasse as of July 31. As the CGC acknowledges (CGC Brief at 48), the Supreme Court has held that “impasse is only a temporary deadlock ... which in almost all cases is eventually broken, through either a change of mind or the application of economic force.” *Charles Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Impasse could mostly certainly exist on July 31 (when the Company presented its final offer, and the Union failed to indicate or provide any

Further, the Company refrained from any implementation of terms of its final offer until after it was clear that the parties had in fact reached impasse – and even then, the Company announced its intentions weeks in advance to give the Union an opportunity to present anything new that would break the impasse and forestall the implementation. Thus, after three weeks of no communication from the Union, the Company advised the Union in early December of its intent to move forward with a partial implementation on January 1, 2016 (ER 514-515). The Union requested a teleconference bargaining session on December 30 – but inexplicably came with no new proposals (ER 679-682). Most critically, during this telephonic session (with the Union fully on notice that implementation was imminent absent a break in the deadlock), the Company made it clear that it had not heard any new proposals from the Union on issues that would prompt it to revisit its revised final offer (ER 679-680). The Company also repeatedly and unequivocally stated that it had no further room to move (ER 679, 680). Then, critically, the Union stated that it had “nothing further to offer at this point” (ER 681). The Company then reiterated and confirmed “to be clear, you said you have nothing further to offer, we don’t either....” (ER 681).

counterproposal), but be broken nearly two months later on September 23 (when the Union finally made a counterproposal). That Altura offered some additional movement in response to the counter underscores the Company’s good faith and sincere desire to get an agreement, not any bad faith. To hold otherwise would encourage parties to make no further movement after an initial state of impasse.

These facts are the facts of impasse. When both sides say they have no proposals to make and nothing to offer, then they are deadlocked. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586, 596-599 (1999) (impasse reached if neither party is willing to move from its position); *Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) (impasse broken once one side has new proposals to make and informs the other side). Since impasse was reached as of the time of implementation, there was no “premature declaration of impasse.”

C. Regardless, the Board’s Decision Relies Overwhelmingly on Subjective Assessments of the Company’s Proposals as the Linchpin of the Finding of a Violation; Without Such Assessments, The Board’s Finding of Overall Bad Faith Bargaining Must Fail.

Ultimately, in the final analysis, it is obvious that the Board’s Decision relies heavily on subjective assessments of the Company’s proposals as the basis for its speculative conclusion that the Company was not intent on trying to reach an agreement, but instead merely offering proposals to frustrate the process of getting an agreement. For the reasons previously stated, the conclusion is unsupported by substantial evidence. Further, the substantial evidence related to the proposals specifically and the “totality of conduct” generally rather pointedly reinforces that Altura was merely attempting to obtain an agreement that it viewed as acceptable.

If the Board’s Decision is stripped of its findings relative to the Company’s proposals, then the Decision cannot stand. First, as previously noted, the Board’s Decision includes no other analysis of purported “other indicia.” But even allowing

for the CGC's argument that the Board's Decision is inclusive of the ALJ's underlying decision, without the findings relative to the Company's proposals, the CGC's case for "overall bad faith bargaining" relies solely on (1) Altura's communications regarding its final offer and belief that the parties were at impasse; (2) Altura's view of the substantive value (or lack thereof) of the November proposals offered by the Union; and (3) the refusal by Altura to bend to the Union's insistence that its executive team travel to Chicago to meet. These facts are insufficient to support an "overall bad faith bargaining" finding.

Thus, as to the first of these items, for the reasons previously stated, *infra* Section II(B), there is nothing impermissible with a party making and standing on its final offer. There is also nothing impermissible with a party communicating that it believes the parties are at impasse and putting the onus on the other party to make new proposals which either belie or break a state of impasse.

As to the second item, the ALJ found that proposals made by the Union in November 2015 should have "ignited" bargaining and caused the Company to change its position (SER 48). This assessment is both factually and legally defective. Factually, the Union's November "proposals" did nothing to advance the ball in bridging the key differences between the parties – and, indeed, in Altura's view, appeared to be just one more artifice designed to stall negotiations further. Specifically:

- The November 3 “proposal” offered nothing meaningful. The fact that the Union dropped its demand that health insurance contributions be equal for all employees was not a meaningful concession – indeed, the health insurance provisions the parties had long followed were never structured in that manner. Dropping this demand merely returned to the status quo regarding contribution amounts, but did not bridge the remaining differences of the parties on health insurance – and did nothing to bridge the gap on the most critical issues in dispute (wages, reclassification of certain technicians, and subcontracting).
- The November 9 “proposal” was the first time the Union had made any proposal for wage increases – at that point, over 5 months after the commencement of bargaining. The bona fides of such proposal was highly dubious given its timing and the fact that it proposed “across the board” increases – despite the fact that the Company had stated from the outset of bargaining in June that it was not in a position to provide across-the-board increases. Further, while the Union finally made a proposal regarding reclassification, it substantially delayed the implementation (problematic since it had already been delayed). The Union also failed to make any proposal regarding subcontracting. Examined as a whole, the Union’s “proposal” on November 9 is arguably regressive, and clearly does nothing

that indicates the parties are closer together in reaching an overall agreement.⁶

- The November 11 “proposal” similarly makes a different regressive move. This time, the Union proposed wage provisions that negated the longtime status quo by which the Company could give increases above the contractual wage rate to meet market conditions. This was an entirely different approach which again, in timing and content, was suspicious and certainly regressive. And once again, there was no proposal on subcontracting.

Looked at as a whole, these “proposals” did nothing to indicate that there was a possible road to getting an actual agreement.

Despite this, in the Pollyannaish view of the ALJ, these “proposals” apparently should have prompted Altura to alter its position to get more in line with the Union’s. Yet this leads right back to the hallmark principles that the Board is not here to sit in judgment of proposals nor force either party to concede on any issue

⁶ Indeed, it appears analogous to the situation in *White Cap, Inc.*, 325 NLRB 1166, 1169 (1998), where upon the resumption of bargaining after a failed ratification vote, the union made proposals that were directly contrary to the employer’s chief objectives as stated months earlier in negotiations. This type of proposal was found to “constitute substantial evidence that the parties ... were at impasse ... which precluded reaching an agreement.”

after it has endeavored without success to reach an agreement. The Board's prior admonitions in this regard bear repeating:

Section 8(d) of the Act sets forth the parties' mutual obligation to bargain in good faith, but makes clear that "such obligation does not compel either party to agree to a proposal or require the making of a concession." A party is entitled to stand firm by a bargaining proposal legitimately proffered. The Board is not permitted, under the guise of finding bad faith, to require the employer to contract in a way which the Board deems proper, nor may the Board "directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

Commercial Candy, 294 NLRB 908 (1989). The ALJ's analysis on this issue clearly seeks "directly or indirectly" to compel Altura to make further concessions based on the proposals made by the Union, even though Altura reasonably viewed them as unhelpful in bringing the parties closer to an agreement.

That leaves the third issue – the Union's insistence that the Company send its executive team to Chicago for bargaining and the refusal by Altura to bend to the Union's insistence. On this issue, the CGC ignores the full bargaining history or the facts regarding the location of the Company and the bargaining unit. The facts are:

- The Company is headquartered in Fullerton, California.
- The Union, with its office outside Chicago, has chosen to represent a bargaining unit of employees that is dispersed throughout the country with no unique connection to the Chicago area.

- The Company agreed to alternate locations between Company headquarters and the Union's offices outside Chicago for the June and July bargaining sessions (thus, clearly not refusing to meet in-person or at the Union's offices).
- The parties had a history of supplementing in-person sessions with video-conference or telephonic negotiations – and it was the Union who first suggested using such in these negotiations for convenience. (ER 684, 687).
- The FMCS assigned these negotiations on their docket to its Pasadena, California, office, consistent with the location of Altura's headquarters, and conducted the mediated sessions there.

Contrary to the argument of the CGC, this is not a case where the employer has insisted on “bargaining by mail” or “bargaining by telephone,” and refused to meet in person or insisted on holding negotiations at an unreasonable or arbitrary location unconnected to the location of the bargaining unit (*see* CGC Brief at 50-51). Indeed, the Company conducted extensive in-person negotiations with the Union and, per their historical practice and at the request of the Union, also agreed to video-conference and telephonic meetings. It continued to offer the Union the option of in-person or video-conference meetings, with the only caveat being that the Company did not want to travel to Chicago (a location with no specific significance to the Company's operations).

There is no legal requirement that an employer agree to the in-person location dictated by a union representing a bargaining unit of its employees. To the contrary, the Act only requires that the parties meet at “reasonable times and places.” 29 U.S.C. § 158(d); *see also Atlanta Hilton*, 271 NLRB at 1603 (“arbitrary scheduling of meetings” is an indicum of bad faith). There is nothing “arbitrary” or “unreasonable” regarding the Company’s request to meet in Fullerton or virtually by use of video or phone conference.⁷ Indeed, by insisting on meeting in Chicago, it was the Union that was arbitrarily insisting on a location largely unconnected to the Company and the bargaining unit – and insisting on in-person negotiations, even though the parties had previously used video-conference meetings at the Union’s request. The Union, not Altura, is more fairly viewed as being “obstructionist” on these facts.⁸

⁷ Indeed, the use of video-conference technology (notably, of the type installed by the bargaining unit employees) was the easiest, least costly, and least burdensome method for all parties concerned. The parties had already used such technology in prior negotiations, and had used it again in the 2015 negotiations. The worldwide COVID-19 pandemic has underscored the ease, convenience, and cost-effectiveness of the use of such technology for bargaining and other meetings.

⁸ As explained in the Opening Brief, the Board ignored substantial evidence of the Union’s dilatory conduct and regressive proposals during bargaining – evidence that must also be considered as part of the “totality of circumstances.” See Altura’s Opening Brief at p. 39, fn. 19.

In summary, the purported “other indicia” of bad faith bargaining referenced by the CGC does not rest on substantial evidence and is unsupported by the law and precedent. It is insufficient to support finding a violation of the Act by Altura.

III. CONCLUSION

Based on the foregoing facts, arguments, and authorities, Altura respectfully requests that this Court grant its petition for review and deny the application for enforcement.

Respectfully submitted this 28th day of December, 2020.

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IV. CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1, Counsel of Record hereby certifies that the Petitioner's Reply Brief was produced using a proportionately spaced typeface, Times New Roman, 14 point, including footnotes, and contains approximately 5,906 words, which is less than the 7,000 words permitted by the Rule.

DATED: December 28, 2020.

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V. CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2020, I electronically filed the foregoing Petitioner's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system:

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